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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 339

AMERICAN PRESIDENT LINES, LTD.,

Petitioner,

—against—

HONORABLE RICHARD H. LEVET, United States District Judge,

Respondent.

BRIEF ON BEHALF OF JAMES WEAVER, PARTY PLAINTIFF-RESPONDENT, IN OPPOSITION TO THE PETITION OF THE AMERICAN PRESIDENT LINES, LTD., FOR A WRIT OF CERTIORARI

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STATEMENT

The District Court action was tried before the Honorable Richard H. Levet, United States District Judge for the Southern District of New York and a jury. The jury returned a verdict in petitioner's favor. The verdict was set aside by the trial justice because he deemed it contrary to the clear weight of the evidence and that such action was necessary to prevent what might be a miscarriage of justice. The order was interlocutory and no permission was granted to appeal therefrom. No final judgment was ever entered in the action.

It is the party-plaintiff-respondent's position that the order setting aside the jury's verdict and granting a new trial, being interlocutory, it is not appealable.

REASONS FOR DENYING THE WRIT

1. The interlocutory order of the Honorable Richard H. Levet, United States District Judge, may not be reviewed.

2. There was no abuse of the undoubted power of the trial judge, in his discretion, to set aside the verdict as being against the weight of the evidence and to order a new trial.

3. There has been no infringement of petitioner's right to a trial by jury.

4. There is no serious constitutional question before the Court.

ARGUMENT

I.

SINCE THE ORDER OF HONORABLE RICHARD H. LEVET SETTING ASIDE THE JURY'S VERDICT AND GRANTING A NEW TRIAL WAS INTERLOCUTORY, IT MAY NOT BE REVIEWED ON APPEAL.

Illustrative of this argument is the case of *Portman* v. *American Home Products Corp.* (2 Cir.), 201 F. 2d 847. In that action a jury returned a verdict for the plaintiff which the District Court set aside because it was against the weight of the evidence. Upon a second trial before another justice a second jury brought in a verdict for the defendant, on which that judge entered the judgment appealed from. The plaintiff argued first that the original judge's order setting aside the verdict was wrong and that it was reviewable upon appeal and that the second judgment should be reversed and a judgment entered in his favor upon the first verdict. The opinion of the Circuit Court, by Learned Hand, Circuit Judge, in part, was as follows:

"It is of course true that the plaintiff could not appeal from the interlocutory order setting aside the verdict on the first trial; moreover the usual rule is that errors made at any stage of an action are reviewable upon appeal from a final judgment, provided they were not reviewable before. However, there may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence. In the often cited decision of Fairmount Glass Works v. Cub Ford Coal Co., 287 U. S. 474, 481, 53 S. Ct. 252, 254, 77 L. Ed. 439, the Supreme Court, after declaring that it would not itself 'review the action of a federal trial court in granting or denying a motion for a new trial for error of fact', added: 'the rule precludes likewise a review of such action by a Circuit Court of Appeals', and in a footnote cited a copious number of such decisions. The Court has recently reaffirmed the rule in United States v. Johnson, 327 U. S. 106, 111, 66 S. Ct. 464, 90 L. Ed. 562, as we have ourselves in Binder v. Commercial Travelers Mutual Accident Association, 2 Cir., 165 F. 2d 896, 902. It is too well established to justify discussion. Since the order was not appealable, because the judge decided that the verdict was against the weight of the evidence, we need not consider whether it was not in any event right on the merits, because of a ground on which he did not rest it; i.e., that the bailiff who had the jury in charge told the forewoman that the jury must come to an agreement."

An order granting or denying a new trial has been held to be not appealable, as of right, but such determination may be challenged on grounds of an abuse of discretion in an appeal from a final judgment (6 Moore's Federal

Practice, 3820; *Milprint Inc.* v. *Donaldson Chocolate Co.*, 222 F. 2d 898; *Buder* v. *Fiske*, 174 F. 2d 260). Further authority is found in *Sylvania Electric Products Inc.* (1st Cir., 1955), 220 F. 2d 422, where a motion for leave to file a petition for a writ in the nature of a writ of mandamus was made to vacate an unappealable interlocutory order. The Court in quoting from *in re Josephson*, 218 F. 2d 174, stated:

> "We do not think that Title 28, United States Code, Section 1651, grants us a general roving commission to supervise the administration of justice in the Federal District Courts within our circuit and in particular to review by writ of mandamus a non-appealable order which we believe should be immediately reviewable in the interests of justice."

Of similar import are the following cases:

In *Atlantic Coastline Railroad Co.* v. *Sonenshine* (4th Cir., 1955), 226 F. 2d 220, it was held that the statute allowing appeals only from final orders, except for a limited class of cases, cannot be evaded by the device of asking the court to issue one of the extraordinary writs such as certiorari, mandamus or prohibition.

In *Southern Railway Co.* v. *Madden* (4th Cir., 1955), 224 F. 2d 320, the court held that it was clear that the order asked to be reviewed was not a final order in the case and hence was not appealable.

In *Columbia Boiler Co. of Pottstown* v. *Hon. Hutcheson* (4th Cir., 1955), 222 F. 2d 718, the court stated that until Congress amends the statute (Title 28, United States Code, Section 1651) so as to permit appeals from interlocutory orders of this character, "we do not think that Appellate Courts should attempt to circumvent the law by use of writ of prohibition or mandamus."

In *Hartford Accident & Indemnity Co. v. Interstate Equipment Corp.* (1949), 176 F. 2d 119, the court in holding that a writ of mandamus would not lie here stated that the Court of Appeals is a Court of limited jurisdiction which jurisdiction does not extend to the review of interlocutory orders.

II.

A VERDICT MAY BE SET ASIDE BY THE TRIAL JUDGE IF CONVINCED THAT IT IS AGAINST THE WEIGHT OF THE EVIDENCE AND PRODUCES AN UNJUST RESULT.

Absent an abuse of discretion, the trial judge had the undoubted power to set aside a verdict as being against the weight of the evidence and to order a new trial herein. *Marsh v. Illinois Central Railroad* (5 Cir.), 175 F. 2d 498, 500, affirms the right of the trial justice to grant a new trial when he feels that the verdict is wrong even though supported by some evidence. Similarly, *Garrison v. United States* (4 Cir.), 62 F. 2d 11, 12, affirms that a trial judge may set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence or is based upon evidence which is false, and that even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice.

The opinion of the Honorable Richard H. Levet clearly indicates the mature deliberation and thought given to the plaintiff's motion before deciding it. We quote in part from said decision:

> "It is true that the authority to grant a new trial must be utilized sparingly and cautiously, for the court 'is not free to reweigh the evidence and set

aside the verdict and grant a new trial merely because * * * (it) feel(s) that other results are more reasonable.' LaBuff v. Texas & New Orleans Railroad Company, D.C.W.D. La., Lake Charles Division, 1954, 126 F. Supp. 759, 763. See also Tennant v. Peoria & P. U. Ry. Co., 1944, 321 U. S. 29, 35; Peterman v. Indian Motorcycle Co., 1 Cir., 1954, 216 F. 2d 289, 292; De Vito v. United Air Lines, D.C.E.D.N.Y., 1951, 98 F. Supp. 88, 97.

"Nevertheless, where the verdict is contrary to the right and justice of the case, it remains the duty of the trial court to set it aside and grant a new trial. Foreman v. Texas & New Orleans R. Co., 5 Cir., 1953, 205 F. 2d 79, 81. As Judge Holtzoff has observed: '* * * If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. Manifestly this authority should be exercised sparingly and cautiously. It should be invoked only in cases in which the evidence preponderates heavily against the verdict. Nevertheless, recourse should be had to it, if the ends of justice so require.' Miller v. Pennsylvania Railroad Co., D.C.D.C., 1958, 161 F. Supp. 633, 641.

"Consequently, this court must evaluate all the significant evidence in the instant case and determine whether, in its own best judgment, the jury here disregarded the clear weight of the credible evidence so that a new trial becomes imperative to prevent injustice. Lewis v. Kepple, D.C.W.D. Penn., 1960, 185 F. Supp. 884, 887; see also Zezan v. Central Railroad Company of New Jersey, 3 Cir., 1959, 266 F. 2d 101, 104."

Commercial Credit Corp. v. *Pepper* (5th Cir., 1951), 187 F. 2d 71, held that the granting or refusing of a new trial is a matter resting solely within the discretion of the trial court. The term "discretion", however, when invoked as a guide to judicial action, means a sound discretion exercised with regard to what is right and in the interests of justice.

III.

THE SETTING ASIDE OF THE VERDICT DOES NOT CURTAIL OR ABRIDGE THE PETITIONER'S RIGHT TO ANOTHER TRIAL BY JURY.

The granting of a motion for a new trial does not supersede the function of a jury but results in another trial which actually serves in effect as a check by a second jury upon the determination made by the first jury (*Waller* v. *Pennsylvania Railroad Co.* [D.C.D.C., 1958], 161 F. Supp. 633; *Marsh* v. *Illinois Central Railroad Co.*, *supra*).

A trial judge exercises an entirely different function in passing upon a motion for a new trial than when ruling upon a motion for a directed verdict or for a judgment notwithstanding the verdict. In considering the latter motions, the judge passes upon a question of law only: whether there is any evidence which, if believed, would authorize a verdict against movant. A motion for a new trial is addressed to the judge's discretion and he may consider the evidence as a whole and weigh it and, if he thinks the jury was mistaken or that the verdict is wrong, although supported by some evidence, he should grant a new trial. The ordering of a new trial does not deny the right of trial by jury as is the case when a verdict is directed or judgment is entered n. o. v. (*Grayson* v. *Deal*, 85 F. Supp. 131 [D.C. Ala., 1949]).

IV.

SINCE PETITIONER'S RIGHT TO A TRIAL BY JURY HAS BEEN PRESERVED BY THE ORDER, ITS CONSTITUTIONAL RIGHTS HAVE NOT BEEN CURTAILED.

It cannot be said where petitioner has been granted a jury trial that it has been denied its rights under the United States Constitution, Seventh Amendment.

The orderly processes of the Court have been observed by the Honorable Richard H. Levet. His order stems from the authority granted under Rule 59 (a) of the Federal Rules of Civil Procedure; he has recognized the right of petitioner to a trial by jury by ordering a new trial before another jury; and a writ of certiorari may not lie herein pursuant to Title 28 U. S. Code, Section 1651 (a).

All of the cases cited by petitioner in support of its application for a writ of certiorari recognize the undoubted discretionary power, not abused, to set aside a jury verdict and order a new trial.

In effect petitioner argues that the setting aside of the verdict in and of itself constitutes an abuse of discretion. It in effect begs the right of appeal where none exists. It assumes this position by attempting to quote out of context from a portion of the trial record. It poses the argument that the Honorable Richard H. Levet has departed from the usual rationale in granting this motion and that a state of confusion exists as to the power of a district judge to set aside a verdict. Obviously its position is respectfully controverted by your respondent. Each and every case must stand on its own feet and if a verdict is set aside, the simple question is -was there right and reason motivating the action of a trial judge in setting aside a verdict or refusing to set it aside?

The petitioner relies heavily on the case of *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir., 1960) cert. denied 364 U. S. 335 (1960), wherein a divided court overruled an order of the trial justice setting aside a verdict. This case is not at all germane to the issue herein for the simple reason that in the *Lind* case, a final judgment was entered and a full appeal was had before the appellate court based on a complete trial record. In effect there the majority held that the Court abused its discretion in setting aside the verdict. This does not appear in the instant matter at all. Reference is respectfully made to the opinion of the U. S. Circuit Court of Appeals for the Second Circuit which denied the petition for a rehearing herein wherein the per curiam decision states in part:

> "We find herein no indication whatever of any abuse of discretion."

CONCLUSION

FOR THE FOREGOING REASONS THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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